Supreme Court, U.S.
FILED
MAY 23 2005
OFFICE OF THE CLERK

(2)

No. 04-1252

In The

Supreme Court of the United States

AMERICAN PELAGIC FISHING COMPANY, L.P.

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For
The Federal Circuit

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS AND NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF THE PETITIONER

Thomas Jon Ward
(Counsel of Record)
National Association of
Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 266-8230

David Biderman
National Solid Wastes
Management Association
4301 Connecticut Ave.,
N.W.
Washington, D.C. 20008

TABLE OF CONTENTS

Page (s)

Interest of *Amicus Curiae* 1

Summary of the Argument 4

Argument 5

I. The Federal Circuit Incorrectly Joined the "Takings" Analysis With the "Property" Analysis 5

II. The Federal Circuit Disregarded This Court's Decisions Concerning The Dissection of Property into Separate Parts 8

Conclusion 11

TABLE OF AUTHORITIES

CASES **Page(s)**

American Pelagic Fishing Company, L.P. v. United States, 379 F.3d 1363 (2004) 6, 7, 8, 10

Andrus v. Allard, 444 U.S. 51 (1979) 6

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 8

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 7

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 7

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 4, 5, 6, 8, 9, 10, 11

Phillips v. Washington Legal Found., 524 U.S. 156 (1998) 5

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 533 U.S. 302 (2002) 4, 7, 8, 9, 10, 11

United States v. General Motors Corp., 323 U.S. 373 (1945) 8

United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1960) 6

Webbs Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 115 (1980) 5

STATUTES

16 U.S.C.A. § 1801 7

42 U.S.C.A. § 6901 3

Mo. Rev. Stat § 260.247 (2004) 4

OTHER

82 Am. Jur. 2d Wrongful Discharge § 1 (2004) 3

Wendy Wunsh, *The Seinfeld Case Tempts Litigation, But Employers Remain the "Masters of Their Domain,"* 15 Lab. Law. 265 (1999) 3

INTEREST OF THE *AMICI CURIAE*

The National Association of Home Builders ("NAHB") and the National Solid Wastes Management Association ("NSWMA") have received the parties' written consent to file this brief as *amici curiae* in support of Petitioner. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 220,000 builder and associate members throughout the United States. Its members include not only individuals and firms that construct and supply single-family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. NAHB is the voice of the American shelter industry.

Throughout the United States, NAHB's members hold and develop property that is subject to a myriad of local, state and federal regulations. In the case below, the Federal Circuit did not conduct a Fifth Amendment takings analysis under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) because it found that the regulation that the Petitioner claimed caused the taking had removed any protectable property interest. As owners of real property, NAHB's members are concerned that the lower court's decision could negatively impact their property rights and diminish their protections under the Fifth Amendment.

---

[1] Pursuant to Rule 37.6 of this Court, NAHB states that its counsel authored this brief. The brief was not written in whole or part by counsel for a party, and no one other than *amici* made a monetary contribution to its preparation.

NAHB has appeared before the Court as an *amicus curiae* or as "of counsel" in a number of cases involving the rights and remedies of landowners who have been adversely affected by governmental actions. These include: *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. County of L.A.*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987)2; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 697 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'Ship v. United States Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), *cert. granted*, 125 S. Ct. 27 (2004); *Lingle v. Chevron U.S.A., Inc.*, 363 F.3d 846, *cert. granted*, 125 S. Ct. 314 (2004); and *San Remo Hotel, L.P. v. City and County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004), *cert. granted in part*, 125 S. Ct. 685 (2004).

NSWMA is a trade association representing for-profit companies in North America that provide solid, hazardous and medical waste collection, recycling and disposal services, and companies that provide professional and consulting services to the waste services industry. Founded in 1962, NSWMA's members operate in all 50 states and the District of Columbia.

The ruling below that there can be no property right associated with an area subject to government regulation or authorization has sweeping ramifications for the solid waste industry. Throughout the United States, thousands of solid waste companies collect, process and dispose solid waste under licenses or other authorizations provided by state or local governments. This essential public service is performed daily, in a cost-effective, environmentally protective manner, subject to applicable regulations. *See* 42 U.S.C. § 6901, *et seq.* (Resource Conservation and Recovery Act). Solid waste companies invest hundreds of millions of dollars each year in capital improvements (e.g., newer and more environmentally friendly vehicles, expanded processing and disposal facilities).

If Congress can pass a law abrogating American Pelagic's right to use its property without triggering a takings analysis, then solid waste companies throughout the United States are little more than at-will employees who can be dismissed for good cause, bad cause, or no cause at all. *See* 82 Am. Jur. 2d Wrongful Discharge § 1 (2004) (providing that at-will employees may be discharged for "any reason or for no reason"); Wendy Wunsh, *The "Seinfeld Case Tempts Litigation, But Employers Remain "Masters of Their Domain,"* 15 Lab. Law. 265, 272 (1999) (explaining that the traditional rule of employment allows "at-will"

employees to be discharged "for good cause, bad cause or no cause at all."). A local government would be completely free to revoke a solid waste company's license to collect residential or commercial waste, for example, and replace that company with its own municipal collection. In a few states, laws have been passed that require local governments to provide advance notice of such action, and provide limited compensation to affected companies. *See, e.g.*, Mo. Rev. Stat. § 260.247 (2004). However, these limited rights under state law should not abrogate a local government's obligation to pay just compensation for the taking of a solid waste company's personal property. The type of confiscatory regulations authorized by the decision below threaten the livelihood of many solid waste companies.

SUMMARY OF THE ARGUMENT

The Federal Circuit failed to follow this Court's case law when it analyzed whether American Pelagic had "private property" that was protected by the Fifth Amendment's Takings Clause. First, the court has incorrectly conflated the tests for determining whether a claimant has protectable property with whether the government has taken the property. Second, the Federal Circuit failed to heed the Court's decisions in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 533 U.S. 302 (2002), ("*Tahoe-Sierra*") and *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) ("*Penn Central*"). The Federal Circuit incorrectly disaggregated the property at issue, the *American Star*, into specific property rights (i.e. the right to use, the right to exclude others) and focused its analysis of whether the Petitioner had constitutionally protected private property on one fraction of one right.

ARGUMENT

I. The Federal Circuit Incorrectly Joined the "Takings" Analysis With the "Property" Analysis.

When a court examines whether a government action violates the Takings Clause of the Fifth Amendment, there are three discrete questions that the court must address:

1) Does the plaintiff have a property interest in "private property" (the "property" analysis);
2) Has the government "taken" the "private property" (the "takings" analysis); and
3) Has the government provided "just compensation" (the "just compensation" analysis)?

See, e.g., Webbs Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 115, 160 (1980) (explaining that the questions of whether just compensation had been paid and whether the claimant had private property were clear). Each of these questions requires a different analysis. For example, in *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998), the sole issue addressed was whether the interest earned on client funds held by attorneys in IOLTA[2] accounts is "private property." In deciding that the interest is the "private property" of the client, the Court looked to "existing rules or understandings that stem from an independent source such as state law" and the "fundamental maximum of property law . . . ." *Id.* at 164, 167. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) ("*Penn Central*"), however, makes clear that there are three factors that inform a "takings" analysis; the economic impact of the government's regulation, the

---

[2] Interest On Lawyer Trust Accounts.

character of the government's actions and the extent to which the government's action has interfered with distinct investment backed expectations. Finally, it is settled that in conducting a "just compensation analysis," a court should reimburse a property owner for the property interest taken and that valuation of the interest should be based on fair market value. *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 633 (1960).

The court below has incorrectly blended the threshold question of whether the plaintiff has a property interest in private property with the analysis of whether the government has committed an action that renders it liable for a taking.

The Federal Circuit began its analysis by citing *Andrus v. Allard*, 444 U.S. 51 (1979), for the proposition that because of the government's "high degree of control over commercial dealings" the Petitioner should have been aware a "new regulation might [] render his property economically worthless." *American Pelagic,* 379 F.3d at 1377 (quoting *Andrus*, 444 U.S. at 66-67). Furthermore, the court below evaluated whether American Pelagic should have a "lower expectation" to use its property because the *American Star* is not land. *Id.* The lower court's reliance on *Andrus* evidences an improper mixing of the property and takings analyses, for in *Andrus*, the Court did not address whether a constitutionally protected property interest existed. Rather, the *Andrus* court was singularly concerned with whether the regulation at issue amounted to a taking of private property. In addition, by considering American Pelagic's "expectations" to use its property in determining whether it had a protectable property interest, the lower court has incorrectly imported one of the *Penn Central* factors into the property analysis.

Moreover, in *Tahoe-Sierra*, 533 U.S. 302, 331, the Court explained that "defining [a] property interest taken in terms of the very regulation being challenged is circular." When determining whether American Pelagic had protectable property, however, the lower court examined the entire statutory and regulatory scheme that American Pelagic claimed was responsible for taking its property. The Federal Circuit described the history of the federal government's regulation of the exclusive economic zone from the 1976 enactment of the Magnuson-Stevens Act, through the 1983 establishment of the Exclusive Economic Zone ("EEZ"), through the 1986 amendment of the Magnuson-Stevens Act. *American Pelagic*, 379 F.3d at 1377. Hence, the court relied on the statutory/regulatory scheme[3] that caused the taking to determine that American Pelagic did not have a protectable property interest.[4] This

---

[3] The Magnuson-Stevens Act, and the fishing permits that the National Marine Fisheries Service requires pursuant to it, restricted the use of the *American Star*. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 842 n.2 (1987) (explaining that using one's property, even though it may be "subjected to legitimate permitting requirements," cannot be described as a governmental benefit).

[4] Examination of the statutory/regulatory scheme in the property analysis also contradicts *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). In *Palazzolo*, the Petitioner claimed the State's wetlands regulations had taken his property. Id. at 615. The State argued that the Petitioner acquired the property after the wetlands laws were enacted and thus the Petitioner was foreclosed from claiming that the regulation caused a taking. In Justice O'Connor's concurrence, she explained that the temporal relationship between the acquisition of title and the enactment of a regulation is not immaterial, but it should be considered when a court is examining the reasonableness of the claimant's

approach improperly unites the "property" analysis with the "takings" analysis and fails to observe the Court's counsel in *Tahoe-Sierra*.

Courts must generally conduct "ad hoc, factual inquiries," when faced with a Fifth Amendment regulatory takings claim. *E.g., Penn Central,* 438 U.S. at 124 (1978). And this Court's precedent has created a framework to guide that analysis. By combining the analysis of whether a claimant has protectable private property with whether the government has taken the property, the Federal Circuit has disregarded the Court's framework.

II. The Federal Circuit Disregarded This Court's Decisions Concerning The Dissection of Property Into Separate Parts.

Ownership of property is a "bundle of rights." *E.g., Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Among these rights are the right to use, to dispose of, and to exclude others from the property. *See, e.g., United States v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945). In determining whether American Pelagic had a Fifth Amendment interest in private property, the court below focused on one fraction of one right[5] ("the right to fish for Atlantic mackerel and herring in the EEZ") to conclude that American Pelagic did not have a basis of a takings claim. *American Pelagic*, 379 F.3d at 1376. By carving the plaintiff's property into such small segments, the Federal

---

investment backed expectations as part of the takings analysis. *Id.* at 633.

[5] One right in the bundle is the right to use property. The right to use property in a specific place in a specific way is a fraction of the right to use property.

Circuit contradicted this Court's decisions in *Penn Central* and *Tahoe-Sierra*.

In *Penn Central,* the owner and lessee (property owners) of the Grand Central Terminal challenged the application of New York's Landmarks Preservation Law (Preservation Law) to its property. The property owners wished to construct a new building on their property that was cantilevered over the terminal. Pursuant to the Preservation Law, the City denied the property owners' request. In arguing that the City had "taken" its property, the property owners claimed that the airspace above the terminal was valuable property and that the law deprived them of any gainful use of their "air rights" above the terminal. *Penn Central,* 438 U.S. at 130. Disagreeing with the property owners, the Court explained: "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id.* Thus, in *Penn Central*, the Court ruled that when courts conduct a takings analysis, it is not proper to divide the "property" into its natural features and then focus the analysis on only one of those features.

Similarly, in *Tahoe-Sierra*, 535 U.S. 302, the Tahoe Regional Planning Agency imposed two development moratoria totaling 32 months in an area around Lake Tahoe, Nevada. Local property owners brought a facial challenge to the moratoria claiming the regulation, though temporary, denied the owners "all viable economic use of" their property while it was in effect. *Id.* at 320.

In *Tahoe-Sierra*, the property owners argued that the Court should "sever a 32-month segment from the remainder of each landowner's fee simple estate, and then ask whether

that segment [had] been taken in its entirety by the moratoria." The Court, however, explained that an "interest in real property is defined by the metes and bounds that describe its geographic dimensions and the terms of years that describes the temporal aspect of the owner's interest." Furthermore, the Court provided that it was incorrect to "disaggregate the petitioner's property into temporal segments corresponding to the regulations at issue . . . ." *Id.* at 331. Therefore, in conducting its "takings" analysis, the Court held that it must look at the property in question "*in its entirety.*" *Id.* (emphasis added).

Thus, both *Tahoe-Sierra* and *Penn Central* stand for the proposition that when conducting the "takings" analysis it is incorrect to divide or separate the property in question into either its natural features or temporal elements and then determine whether the government has taken the division.

The Petitioner owned the *American Star*. To determine whether American Pelagic had a property interest in private property, the court below asked: "Was the right to fish for Atlantic mackerel and herring in the EEZ a legally cognizable property interest such that it was a stick in the bundle of rights that American Pelagic acquired as the owner of the *Atlantic Star*?" *American Pelagic*, 379 F.3d at 1376. Prior to asking this question, however, the court had recognized that the government conceded that the *Atlantic Star* was "property" and that American Pelagic had an interest in the property. *Id.* at 1376 n. 15. That should have been the end of its "property" analysis. Instead, however, the court "disaggregated [petitioner's] property" into the sub-right of using the *American Star* to catch specified fish in a particular area. *Tahoe-Sierra*, 535 U.S. at 1483. By dividing property "into discrete segments" and failing to look at it "in its entirety," the Federal Circuit has

contradicted this Court's teachings in *Tahoe-Sierra* and *Penn Central.*

CONCLUSION

The Federal Circuit has disregarded this Court's precedent by conflating the questions of whether the Petitioner has constitutionally protected property in the *American Star* with whether the government should be liable for taking said property. Furthermore, inconsistent with this Court's decisions in *Tahoe-Sierra* and *Penn Central,* the court below failed to conduct its property analysis on the property in its entirety, and instead focused only on part of one stick in American Pelagic's "bundle of rights."

It is important for the Court to grant certiorari to ensure that the definition of "property" is not narrowed by the property analysis that the Federal Circuit has created in *American Pelagic.*

DATED: May 23, 2005

Respectfully submitted,

Thomas J. Ward *
National Association of
Home Builders
**Counsel of Record*

David Biderman
National Solid Wastes
Management Association